BLANK

PAGE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 760

ARKANSAS FUEL OIL COMPANY,

Appellant,

versus

STATE OF LOUISIANA EX REL. HYMAN MUSLOW,

Appellee.

Appeal from the Court of Appeal, Second Circuit, State of Louisiana.

BRIEF OF APPELLANT.

H. C. WALKER, JR.,
ROBERT ROBERTS, JR.,
Counsel for Appellant.

BLANK

PAGE

INDEX.

SUBJECT INDEX.

CASES CITED.

INDEX—Continued

CASES CITED—(Continued)

INDEX—Continued

CASES CITED—(Continued)

TEXT BOOKS CITED.

STATUTES CITED.

INDEX—Continued

STATUTES CITED—(Continued)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 760.

ARKANSAS FUEL OIL COMPANY,

Appellant,

versus

STATE OF LOUISIANA EX REL. HYMAN MUSLOW,

Appellee.

Appeal from the Court of Appeal, Second Circuit, State of Louisiana.

BRIEF OF APPELLANT.

I.

REPORT OF OPINIONS BELOW

The opinion of the Court of Appeal, Second Circuit, State of Louisiana, in this case is reported only in *176 So. 686.* The decree and *per curiam* opinion of the Supreme Court of Louisiana, denying writ of certiorari or review, are not reported. The opinion of the Court of Appeal, Second Circuit, State of Louisiana, denying appellee's application to vacate order staying execution, is reported only in *177 So. 476, Adv. Sheets, January 13, 1938.*

II.

JURISDICTION

This cause is before this Court on an appeal granted January 6, 1938 under the authority of *Paragraph (a), Section 344, Title 28, United States Code*, by the Presiding Judge of the Court of Appeal, Second Circuit, State of Louisiana, from a judgment entered by that Court in the cause on June 1st, 1937 (R. 45). The grounds of the jurisdiction of this Court are stated in detail in appellant's Statement as to Jurisdiction.

III.

STATEMENT OF THE CASE

This suit was begun in the First Judicial District Court of Louisiana, within and for Caddo Parish, by a petition for a mandamus (R. 1) in the name of the State of Louisiana on the relation of Hyman Muslow, who will be referred to as the appellee. The defendant was Louisiana Oil Refining Corporation; for which corporation Arkansas Fuel Oil Company was, on January 18th, 1937, substituted as defendant by order of the District Court (R. 34). For convenience, Louisiana Oil Refining Corporation and Arkansas Fuel Oil Company will be referred to as the appellant.

The object of the suit was to recover from appellant $950.00, the alleged value of certain crude oil, said to have been produced by appellee from described lands in Caddo Parish, Louisiana, and sold and delivered to appellant. The petition contained no allegation that the appellee was owner

of the oil, nor that those from whom he had a mineral lease were the owners of the land from which it was produced. But appellee referred (R. 3) to a statute of Louisiana, *Act No. 64 of 1934* [1] and alleged that his lessors were the last record owners of the property and had acquired it by a certain deed, which was translative of property.

On the return day of the writ, appellant filed a plea (R. 4) that the statute, if enforced in the manner sought by appellee, would compel appellant to pay him the value of property which did not belong to him and would leave appellant responsible to the true owner, thus depriving it of its property without due process of law and denying it the equal protection of law, contrary to the provisions of the Constitution of the United States. Filed at the same time was appellant's answer, (R. 5) renewing its plea of unconstitutionality, and alleging that appellee was not owner of the oil in question and that his lessors did not own the land from which it was produced. Appellant also

---

[1] **Acts of Louisiana 1934, p. 281; amended by Act No. 24 of First Extra Session of 1935, Acts of Louisiana, Extra Sessions of 1934 and 1935, p. 517, Acts of Louisiana, Extraordinary Session 1935, p. 87.** The statute as amended is quoted in full in the appendix to this brief, page 26. This statute, so far as relevant here, provides that where any person who has opened a mine or well on any land in the State has a mineral lease thereon, granted by the last record owner, who holds under an instrument sufficient in terms to transfer the title of the land, such lessee shall be presumed to be holding under lease from the true owner, and shall be entitled to all oil, gas or other minerals produced from the wells until a suit shall be filed to test the title of land and that it shall be unlawful for purchasers of minerals from such producers to withhold payment of the purchase price of the products. Summary remedies are provided for the collection from purchasers of the price of minerals. Lands belonging to the State of Louisiana are excepted from the operation of the statute.

The expression "instrument sufficient in terms to transfer the title of the land" embodies an idea fundamental in the Louisiana law; it is the same as the "just title," which need not be executed by the true owner; **Revised Civil Code of Louisiana, Article 3485.** To have this character, it is necessary only that the instrument be sufficient in form to transfer the property on the assumption that the grantor is owner of the land; **Revised Civil Code of Louisiana, Articles 3479, 3483, 3484, 3485.**

claimed that the statute was not applicable, but this con tention was ruled against it in the trial court and in th Court of Appeal, and these rulings are, of course, not as signed as error in this Court.[2]

On the trial, the Court refused, because of the provision of the statute, to admit evidence offered by appellant t prove that the appellee did not own the oil in question, an to prove that his lessors did not own the land from whic it was produced (R. pp. 16, 24), and in a written opinio (R. 27) held the statute valid and constitutional. Judgmer for $445.55, with interest and costs (R. 35) was entere for appellee.

On appeal to the Court of Appeal, Second Circuit, Sta of Louisiana,[3] this judgment was affirmed (the decree is the concluding paragraph of the Court's opinion, R. 45 In its opinion (R. 36) the Court of Appeal found the questio of the constitutional validity of the statute controlling a held that it denied appellant no rights guaranteed by t Federal Constitution. Rehearing was denied by the Cou of Appeal (R. 46) and the Supreme Court of the Sta refused to grant a writ of certiorari or review (R. 51).

---

[2] In his petition appellee also claimed that appellant, having r ceived the oil, was estopped to withhold its price; this contention w controverted by the appellant, but was not passed on by the trial co and the Court of Appeal expressly refrained from deciding it (R. 4 Under these circumstances, the case is appealable to this Court, was pointed out in appellant's Statement as to Jurisdiction, referer having been made there to the cases of **Grayson vs. Harris, 267 U. 352, 69 L. Ed. 652,** and **International Steel & Iron Company vs. Natio al Surety Company, 297 U. S. 657, 80 L. Ed. 961.** To which may added a case since decided by this Court (on January 31, 1938), **India ex rel. Anderson vs. Brand, 82 L. Ed. Adv. Op. No. 9, February 14, 19 p. 444.**

[3] As was pointed out in appellant's Statement as to Jurisdicti under the judicial system of Louisiana the appeal to the Court Appeal presented for review every question passed upon and eve ruling made by the District Court; see **Hawkins vs. Costley, 169 229, 124 So. 837,** and **State Ex Rel. Schlater vs. Judge, 40 La. Ann. 8 5 So. 407.**

IV.

ASSIGNMENT OF ERRORS

The errors assigned by appellant (R. 53) are interrelated, presenting together the single question of the constitutional validity of the statute in question. Argument will be based generally upon the three assignments of error, and accordingly all are specified, as follows:

1. The Court of Appeal, Second Circuit, State of Louisiana, erred in this cause in its opinion and decree herein holding valid and constitutional *Act No. 64 of 1934* of Louisiana, by reason of which holding and decree plaintiff recovered judgment in the cause against defendant which otherwise it could not have obtained. And which holding and decree were made notwithstanding defendant's contentions, made in the trial court by answer and plea of unconstitutionality and renewed in the Court of Appeal, that the said statute so applied would enable plaintiff to recover of defendant the value of certain crude oil delivered by plaintiff to defendant but which plaintiff did not own; and that the purported protection given by the statute to defendant from a claim by the true owner of the oil converted by the defendant was illusory and not real and that defendant, being thus left responsible to the true owner of the converted oil for its value, would be deprived of its property without due process of law, contrary to the provisions of the Constitution of the United States.

2. The said Court of Appeal erred in its opinion and decree herein affirming the ruling of the District Court, made upon the trial of the cause, by which defendant, now appellant, was denied the right to introduce evidence to show that plaintiff was not and had never been owner of

the oil to recover the value of which the suit was brought. Which ruling was made and affirmed on the sole authority of the provisions of the *Act No. 64 of 1934* of Louisiana, above referred to, notwithstanding defendant's insistence that the statute, thus applied, would leave it responsible to the true owner of the oil in question and thereby deprive it of its property without due process of law, contrary to the provisions of the Constitution of the United States.

3. In said suit there was drawn in question, in the manner hereinabove pointed out, the validity of the statute known as *Act 64 of 1934* of Louisiana, entitled—"To foster the development of the natural resources of Louisiana by making it unlawful to withhold payment of any sum due lessor, royalty owner, lessee or producer under an oil, gas and mineral lease where the lessee or producer has developed real property under a lease from the last record owner of such property, or of the mineral rights in and to said property have been alienated as of the date of such lease and under whom said lessee or producer claims, holding under an instrument sufficient in terms to transfer title to such property or said mineral rights; to authorize the purchaser of oil, gas or other minerals produced from such property to pay the price therefor to any party in interest under said mineral lease unless and until a suit testing the title to such property or said mineral rights is filed in the district court of the parish wherein said property is situated, with due notification of such filing given to such purchaser in interest, and releasing such purchaser from all responsibility in connection with all payments so made; to declare such producer, as concerns such purchaser against all other parties, conclusively presumed to be the true and lawful owner of all oil, gas or other minerals produced on said property; to provide that said purchaser shall not be entitled to the benefits of this Act unless recorded notice of

said purchase first appears in the conveyance records of the parish where the land producing the purchased products is located; to limit the effects of this Act with respect to such oil, gas or other minerals purchased prior to its effective date; to provide a remedy to compel payment as aforesaid, or under any division order; and to repeal all laws, or parts of laws, in conflict with the provisions of this Act."—on the ground that it was repugnant to the Constitution of the United States and particularly the Fourteenth Amendment to the Constitution, and the decision of the Court of Appeal was in favor of the validity of the statute, which decision is hereby assigned as error.

V.

ARGUMENT

Summary

A. Appellant has the necessary interest to urge the constitutional invalidity of *Act No. 64 of 1934.*

Provident Institution for Savings vs. Malone, 221 U. S. 660, 55 L. Ed. 899;
Security Savings Bank vs. California, 263 U. S. 282, 68 L. Ed. 301;
Cunnius vs. Reading School District, 198 U. S. 458, 49 L. Ed. 1125;
Blinn vs. Nelson, 222 U. S. 1, 56 L. Ed. 65;
Grandy vs. Kennedy, 104 Va. 826, 52 S. E. 635, 4 LRA (N. S.) 944.

B. In Louisiana the owner has the sole right of extracting oil from his land and one who deprives him of this right has deprived him of a vested right of property.

Frost Johnson Lumber Company vs. Salling's Heirs, 150 La. 756, 91 So. 207;

Shaw vs. Watson, 151 La. 893, 92 So. 375;
Federal Land Bank of New Orleans vs. Mulhern, 180 La. 627, 157 So. 370;
Gulf Refining Company vs. Glassell, 186 La. 190, 171 So. 846;
Elder vs. Ellerbe, 135 La. 990, 66 So. 337.

C. The statute in question as applied in this case deprives the owner of his vested right to take the mineral product of his land, without due process of law and without compensation or redress, and is invalid.

Truax vs. Corrigan, 257 U. S. 312, 66 L. Ed. 254;
Cooley, Constitutional Limitations (8th Edition), Vol. 2, pp. 739, 758, 769;
Ieck vs. Anderson, 57 Calif. 251;
Boorman vs. Santa Barbara, 65 Calif. 313, 4 Pac. 31;
State vs. Savings Union Bank & Trust Company, 186 Calif. 294, 199 Pac. 26;
Griffin vs. Wilcox, 21 Ind. 370;
People ex rel. Deneen vs. Simon, 176 Ill. 165, 44 L. R. A. 801, 68 Am. St. Rep. 175, 52 N. E. 910;
Tyler vs. Judges of Court of Registration, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812, writ of error dismissed, *179 U. S. 405, 45 L. Ed. 252;*
Douglas vs. Westfall, 85 Minn. 437, 57 L. R. A. 297, 89 Am. St. Rep. 571, 89 N. W. 175;
Robinson vs. Kerrigan, 151 Calif. 40, 121 Am. St. Rep. 90, 12 Ann. Cas. 829, 90 Pac. 129;
Drake vs. Frazer, 105 Neb. 162, 11 A. L. R. 766, 179 N. W. 393;
State ex rel. Monnet vs. Guilbert, 56 Ohio St. 575, 38 L. R. A. 519, 60 Am. St. Rep. 756, 47 N. E. 551;
American Land Company vs. Zeiss, 219 U. S. 47, 55 L. Ed. 82.

D. Appellant is not estopped from refusing to pay the purchase price of the oil in question.

Revised Civil Code of Louisiana, Articles 2452, 2501, 2505;

Bonvillain vs. Bodenheimer, 117 La. 793, 42 So. 273;
Tennent vs. Caffery, 163 La. 976, 991, 113 So. 167, 173;
Abney vs. Levy, 169 La. 159, 124 So. 766.

A. Appellant has the necessary interest to urge the constitutional invalidity of Act No. 64 of 1934.

The appellant in this case is faced with paying to the appellee, by virtue of the provisions of the Louisiana statute in question, the value of the oil extracted from the land, and of being compelled to pay again to the true owner who will say that his property may not be thus taken without due process of law. Under these circumstances, the appellant is entitled to urge the invalidity of the statute.

Provident Institution for Savings vs. Malone, 221 U. S. 660, 55 L. Ed. 899;
Blinn vs. Nelson, 222 U. S. 1, 56 L. Ed. 65;
Security Savings Bank vs. California, 263 U. S. 282, 68 L. Ed. 301;
Cunnius vs. Reading School District, 198 U. S. 458, 49 L. Ed. 1125;
Grandy vs. Kennedy (Selden's Executor vs. Kennedy), 104 Va. 826, 52 S. E. 635.

In *Provident Institution for Savings vs. Malone, 221 U. S. 660, 55 L. Ed. 899,* which was a suit by the treasurer of the Commonwealth of Massachusetts to take over deposits, long unclaimed, from a savings bank, under authority of a statute of the state, this Court held that the bank, so far as its rights were involved in those of its depositors, might raise the objection that the property was taken without due process of law.

Blinn vs. Nelson, 222 U. S. 1, 56 L. Ed. 65, a suit by the putative heirs of an absentee for the distribution of her estate, and *Security Savings Bank vs. California, 263 U. S.*

282, 68 L. Ed. 301, a suit by the state to take possession of unclaimed bank deposits, were defended on the ground that the statutes involved deprived the true owners of their property without due process of law. In these decisions is implicit the rule that to subject to double liability one in a situation like that of the appellant is to deprive him of his property without due process of law. See also *Cunnius vs. Reading School District, 198 U. S. 458, 49 L. Ed. 1125.*

Grandy vs. Kennedy (Selden's Executor vs. Kennedy), 104 Va. 826, 52 S. E. 635, presents an instance where the debtor, in a situation analogous to that of the appellant, was compelled to pay for the second time. There a former resident returned to the State after an absence of some years and found that a debt due him had been paid to an administrator of his estate, appointed pursuant to the provisions of a Virginia statute. The Supreme Court of Appeals of Virginia, finding that the effect of the statute would be to deprive him of his property without due process of law, held it invalid and allowed him to recover the debt.

B. In Louisiana the owner has the sole right of extracting oil from his land and one who deprives him of this right has deprived him of a vested right of property.

It is the settled jurisprudence of Louisiana that, while oil and gas in place are not subject to absolute ownership as specific things apart from the soil, the owner of the soil has the exclusive right to go upon the land and search for and take these minerals, which, when reduced to possession, belong to him.

Frost Johnson Lumber Company vs. Salling's Heirs, 91 So. 207, 150 La. 756;
Shaw vs. Watson, 151 La. 893, 92 So. 375;
Gulf Refining Company vs. Glassell, 186 La. 190, 171 So. 846.

The decisions referred to make it clear that so long as the ownership of the land is not severed from the mineral ownership, this exclusive right to take the minerals is one of the attributes of complete ownership, as is the right to the possession of a house, the right to cut wood and to harvest the crops. And when this right is granted to another separately from the land the purchaser obtains a real right, a servitude. When minerals are reduced to possession they become the property in perfect ownership of the owner of the land or the mineral rights therein. The courts of Louisiana have heretofore been open to landowners who have retained their mineral rights, and to owners of real rights of mineral ownership, to protect their property by the petitory action *(Louisiana Code of Practice, Article 45)*, the possessory action *(Louisiana Code of Practice, Article 46)*, an action for damages *(Bayou Pierre Petroleum Company vs. Dyer, 168 La. 313, 122 So. 49)* or a suit for an injunction on a showing of irreparable injury *(United Gas Public Service Company vs. Arkansas Louisiana Pipeline Company, 176 La. 1024, 147 So. 56)*. In fact, until the enactment of the present statute, the mineral owner for the protection of his property had every right in the courts of the State which was enjoyed by the owners of other classes of property. The Court of Appeal recognized this in its opinion in the present case when it said (R. 41):

> "It is not disputed that as a rule the true owner of the soil has a right of action against the purchaser of oil from one who first reduced it to possession. The right of the true owner to hold the purchaser or converter of the oil for its market value is a legal one, created and continued by lawful authority and, of course, may be modified, abridged or entirely abolished by the same or a co-equal power."

Although we emphatically do not agree with the concluding clause of the sentence quoted.

A striking illustration of the nature of this property right is afforded by the opinion of the Supreme Court of Louisiana in the case of *Federal Land Bank of New Orleans vs. Mulhern, 180 La. 627, 157 So. 370,* a suit to foreclose a mortgage on the ground that by withdrawing gas from the mortgaged land, the defendant, mortgagor, had breached his covenant against deterioration and waste of the property. The Court described the nature of the mortgagee's right with respect to the minerals in place as follows *(180 La. 634, 157 So. 373):*

> "In order to secure their indebtedness to plaintiff, these defendants mortgaged their property in its favor. They granted to their creditor a right over their property for the security of its debt. C. C. Art. 3278. Mortgage being a species of pledge (C. C. Art. 3279), the property mortgaged was bound for the payment of the debts. Mortgage is a real right on the property bound for the discharge of the obligation. 'It is in its nature indivisible and prevails over all the immovables subjected to it, and over each and every portion.' C. C. Art. 3282. The property bound was the land, which includes everything on and beneath its surface. While the owner of land does not own the fugitive minerals, such as oil and gas, beneath its surface, but only the right to reduce them to possession and ownership, and while such minerals are not susceptible of ownership apart from the land (Frost-Johnson Lbr. Co. v. Salling's Heirs, 150 La. 756, 91 So. 242, reaffirmed in numerous recent cases), yet those minerals, while in place in the ground beneath the surface, unsevered, are real estate, a part of the land itself, a part of the realty, as much so as timber, coal, iron, and salt. 12 R. C. L., heading 'Gas', p. 864, and authorities cited under note 4; 18 R. C. L., heading 'Mines', p. 1206, and authorities cited under note 18; 27 Cyc., heading 'Mines and Minerals,' p. 629, and cases cited under note 16; 40 C. J., heading 'Mines and Minerals,' p. 904, § 422, and cases cited under note 80.

> "A lease granted by the owner of land for the development of the property for oil and gas is, in a sense, a conveyance of the mineral rights, an alienation of a part of his interest in the land, a dismemberment of the realty. Shaw v. Watson, 151 La. 893, 92 So. 375.
>
> "The gas in place in the ground being a part or element of the realty, it follows that it constitutes a part of the value of the land, and it, like the surface of the realty, was pledged by the mortgagors to the mortgagee as security for the debt. By giving the mortgage, the mortgagors granted to the mortgagee a right, a species of pledge, over not only the surface of the land, but over all its constituent elements, including the gas in place and unsevered."

And after referring to the facts with regard to the extraction of the gas, the opinion proceeds *(180 La. 635, 157 So. 373)*:

> "The result was that the fee was impaired, the value of the realty was diminished to the extent of the value of the gas reduced to possession, and the mortgagee's security weakened. The realty mortgaged was thereby deteriorated to the prejudice of the mortgagee's rights in violation of one of the stipulations in the mortgage, whereby they bound and obligated themselves not to deteriorate the property mortgaged to the prejudice of the mortgage.
>
> "These oil and gas leases were in the nature of servitudes on the property for the extraction of the gas, and, while the mere establishment of them on the realty did not necessarily depreciate the value of the estate, the exercise of or use of them necessarily had that effect."

Further emphasis is given to the fact that mineral ownership is a vested right of property by the holding of the Louisiana Courts that one who is evicted, notwithstanding he has possessed in good faith, must nevertheless account to the true owner for minerals extracted from the land. It is

the law of Louisiana, *Revised Civil Code of Louisiana, Articles 3451, 3453,* that one who has possessed in good faith is not bound to restore to the owner the fruits of the thing, such as crops and rents, which the possessor has received prior to being sued by the owner.

But the Supreme Court of the State has steadily adhered to the ruling that a possessor in good faith must pay to the owner the value of oil and gas which he has taken from the land. The possessor in such case has not merely taken the fruits, he has appropriated a part of the immovable, the land itself.

Elder vs. Ellerbe, 135 La. 990, 66 So. 337.

It is clear that the exclusive right of the owner of land in Louisiana to take oil therefrom is inseparably a part of the numerous rights he has with respect to the land which together make up complete ownership—the mastery of the thing and the right of excluding all others from its enjoyment, subject only to the police power of the State. It is an attribute of ownership and not of possession—a vested right of property.

C. The statute in question as applied in this case deprives the owner of his vested right to take the mineral product of his land, without due process of law and without compensation or redress, and is invalid.

The oil which may be obtained from one's land, once taken, is gone forever. Perhaps the simplest way the State could take a man's right to the mineral content of his land without process of law would be by legislation to provide that the State could take the oil without compensation—a confiscation statute. The next simplest way, it appears, is

to provide immunity from suit for private individuals who take the oil. And this is just what the statute under attack does provide.

Conditions precedent to the applicability of the statute, as was pointed out by the Court of Appeal (R. 39) are the existence of a duly recorded mineral lease to the producer from one who has a recorded deed sufficient in terms to transfer the title of the property. When the statute is brought into operation by the concurrence of these conditions, the results are

(1) That it becomes unlawful to withhold sums of money, including the purchase price of minerals, arising as rentals, royalties, or otherwise under the lease *(Section 1)*; and

(2) The producer is presumed to be holding under lease from the true owner "and the lessor, royalty owner, lessee or producer, or persons holding from them shall be entitled to all oil, gas or other minerals so produced" until a suit shall be filed for the revendication of the land *(Section 2)*.

Oil taken from the land prior to the filing of a suit, while the other conditions for applicability of the statute are in existence, is gone forever so far as the owner is concerned. The statute withdraws from him the right to sue the purchaser who has converted his property or who has aided the producer in withdrawing the oil from the land; and the "lessor, royalty owner, lessee or producer" and all persons holding from them. For the Act says, that until suit be filed, they *"shall be entitled to all oil, gas or other minerals so produced."*

The suggestion by the Court of Appeal in its opinion in the present case (R. 41) that the owner preserves his recourse

against the producer is plainly erroneous. We recognize, of course, that this Court ordinarily accepts the construction put upon the statutes of a state by its Courts; but what the Court of Appeal said was not a construction of the statute and evidently was said by inadvertence and by way of illustration.

There is no language in the statute, which we can discover, which can bear that construction. The expression of the Court of Appeal is a *dictum* which the Supreme Court of Louisiana is not apt to follow, and by which this Court is not bound.

> *Gantly vs. Ewing, 3 How. 707, 11 L. Ed. 794;*
> *Carroll vs. Carroll, 16 How. 275, 14 L. Ed. 936.*

Be that as it may, however, it makes no difference as to the constitutionality of the statute. The Legislature has no greater authority to absolve the appellant, which helped the producer extract and remove the oil, than it has to absolve both the appellant and the appellee. Pipe line purchasers of oil generally are solvent, and often the lease operators are not.

Apparently very few legislatures have ever imagined that they had the power to do any such thing as is attempted by the Act in question. In known oil fields, by far the most valuable attribute of a man's property in land, is the exclusive right which he has to extract the oil. That property right may not be taken away from him or made valueless without redress.

> "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. And we have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principle we are con-

sidering, than the following, from an opinion by Mr. Justice Johnson of the Supreme Court of the United States: 'As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this,—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' While no one has a vested right in any particular rule of the common law, the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process of law is intended to preserve, and purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

Cooley's Constitutional Limitations, (8th Edition) Vol. 2, p. 739.

Mr. Chief Justice Taft, for the Court in *Truax vs. Corrigan, 257 U. S. 312, 66 L. Ed. 254,* made the following observation *(257 U. S. 329, 66 L. Ed. 262):*

"The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute, is manifest upon its statement. It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious

invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

At *257 U. S. 334, 66 L. Ed. 264:*

"The 14th Amendment, as this court said in Barbier v. Connolly, already cited, intended 'not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts;* that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.' "

(Italics are by the court.)

These principles do not comport with the ruling of the Louisiana Court of Appeal that the Legislature of the State of Louisiana may withdraw from the owner of oil in that State the right to reclaim its value from one who has taken or assisted in taking such property, and has actually converted the oil to his own use.

The language quoted from *Truax vs. Corrigan, supra,* exposes the fallacy of the assumption on which the decision of the Court of Appeal is based (R. 43), which confuses remedy with right.

It is rather difficult to pass, in the present case, from general principles to specific rulings; because the statute, apparently, is unique. Probably relevant, however, are the many cases holding invalid legislative acts adjudging forfeitures of rights and property. See *Ieck vs. Anderson, 57 Calif. 251*, a case of forfeiting nets for illegal fishing; *Boorman vs. Santa Barbara, 65 Calif. 313, 4 Pac. 31*, a case of assessing benefits upon lands for improvements without notice. A statute providing for the escheat of unclaimed bank deposits to the state without any proceedings against the depositor would manifestly be a taking of property without due process of law; *State vs. Savings Union Bank & Trust Company, 186 Calif. 294, 199 Pac. 26.* Congress has no power to protect parties assuming to act under the authority of the general government during the existence of a civil war by depriving persons illegally arrested, or whose property has been seized, of all redress in the courts, *Griffin vs. Wilcox, 21 Ind. 370.* See also *Cooley's Constitutional Limitations (8th Edition), Vol. 2, p. 758.*

Very similar to the present statute are some which have been held invalid, and which purport to make tax deeds conclusive evidence of a complete title and to preclude the owner of the original title from showing their invalidity.

> "Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured

for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law. A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property."

Cooley's Constitutional Limitations, (8th Edition) Vol. 2, p. 769.

When considering the question of the validity of this statute, we supposed that it had a parallel in the legislation of some other mining state. Being unable, however, to find any reference in any of the books to similar enactments, inquiry was made of Honorable C. A. Morvant, who introduced the bill in the Louisiana Legislature, and he informed us that the idea embodied in the statute was original and that, so far as he knew, there was no similar legislation elsewhere.

Perhaps a close analogy to the situation here presented is the question which arises in determining the validity of the various Torrens or title registration acts; specifically the question which arises when a particular tract of land is first sought to be brought under the operation of the statutes whereby a system of title registration is provided and transfers are guaranteed by the state. In establishing such a system, however, difficulty is invariably encountered in bringing the title of a particular tract under the statute first, or, in other words, the difficulty of cutting off the rights of unknown, contingent or doubtful claimants to the title.

It has been claimed of many of these statutes that they deprived the true owners of land of their property without

due process of law; in that jurisdiction of the person is not obtained by publication of notice as to unknown claimants and those residing out of the jurisdiction of the Court. Generally, those statutes have been sustained which provide that the petitioner, seeking to register his title, shall give the name and address of all persons holding or claiming any interest in the land, adverse or otherwise; that notice shall be given in the same manner as a summons, either personally or by substituted service in cases where a summons might be served in that manner; that notice shall be given by publication to unknown claimants; and which provide for a hearing on the matter of the petitioner's right.

People ex rel. Deneen vs. Simon, 176 Ill. 165, 44 L. R. A. 801, 68 Am. St. Rep. 175, 52 N. E. 910;
Tyler vs. Judges of Court of Registration, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812, writ of error dismissed, *179 U. S. 405, 45 L. Ed. 252;*
Douglas vs. Westfall, 85 Minn. 437, 57 L. R. A. 297, 89 Am. St. Rep. 571, 89 N. W. 175;
Robinson vs. Kerrigan, 151 Calif. 40, 121 Am. St. Rep. 90, 12 Ann. Cas. 829, 90 Pac. 129;
Drake vs. Frazer, 105 Neb. 162, 11 A. L. R. 766, 179 N. W. 393.

But a title registration statute, which does not require personal service of summons or notice even on resident claimants whose existence, names and places of residence are known to the petitioner is invalid as not giving due process of law.

State ex rel. Monnet vs. Guilbert, 56 Ohio St. 575, 38 L. R. A. 519, 60 Am. St. Rep. 756, 47 N. E. 551.

The act we are here considering is very different from any Torrens acts of which we have been able to find a discussion. All of the title registration acts do make some pretense at least of providing a procedure for the cutting off

of the rights of the true owners, and that after a hearing in Court; whereas the *Act of 1934* is a patent attempt by mere legislative *dictum* to deprive the true owner of the land and oil of his rights without any opportunity on his part to protect himself. For instance, suppose that the true owner of the land, from which the particular oil here in question had been produced, should notify the defendant that he expected to hold it for the value of the oil, but has not filed a suit; the legal situation so far as concerns the application of the act would be no different whatever, and if the act is valid, the plaintiff nevertheless would be entitled to a judgment.

A pertinent discussion is contained in *American Land Company vs. Zeiss, 219 U. S. 47, 55 L. Ed. 82,* which involved the validity of a statute passed in California to remedy a condition caused by loss of title papers in the San Francisco earthquake and fire. That statute provided a proceeding to establish title as against the whole world, and was sustained by this Court against the attack that it deprived the true owners of their property without due process of law. The statute contained provision for publication once a week for two months; for actual service of process upon all known claimants; and after rendition, the decree confirming the plaintiff's title was open for one year. The Court sustained the statute as one providing for a proceeding *in rem* (so far as it affected the rights of unknown claimants), and stated that looking at the matter from that viewpoint the question was whether the safeguards which the statute provided were adequate; and it was held that the procedure provided adequate safeguards for both known and unknown claimants of the title. In the opinion it is said *(219 U. S. 66, 55 L. Ed. 97):*

> "It is to be observed that the statute not only requires a disclosure by the plaintiff of all known claimants, but moreover, at the very outset, contains words of limita-

tion that no one not in the actual and peaceable possession of property can maintain the action which it authorizes. No person can therefore be deprived of his property under the statute unless he had not only gone out of possession of such property and allowed another to acquire possession, or, if he had a claim to such property or an interest therein, had so entirely failed to disclose that fact as to enable a possessor to truthfully make the affidavit which the statute exacts of a want of all knowledge of the existence of other claimants than as disclosed in his affidavit. Besides, it is to be considered that the statute, as construed by the California court, imposed upon the one in possession seeking the establishment of an alleged title the duty to make diligent inquiry to ascertain the names of all claimants. Instead, therefore, of the statute amounting to the exertion of a purely unreasonable and arbitrary power, its provisions leave no room for that contention. On the contrary, we think the statute manifests the careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of unknown claimants, and to give such notice as, under the circumstances, would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. To argue that the provisions of the statute are repugnant to the due process clause because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings is in effect to deny the power of the state to deal with the subject. The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

The trial Court thought *Act 112 of 1894*, as amended by *Act 140 of 1918* and *Act 64 of the Extra Session of 1921*[4]

[4] **Acts of Louisiana, 1894, p. 151; Acts of Louisiana, 1918, p. 239; Acts of Louisiana, Extra Session of 1921, p. 90. See Dart's Louisiana Statutes, secs. 644 and 645.**

furnished an analogy (R. 29). This statute provides that any bank which pays out funds, credited on its books to a deceased person, in reliance on the judgment of a Court of competent jurisdiction, shall be fully protected against further claim on account of its debt to the deceased.

The analogy is very remote if it exists at all. In the first place, persons might conceivably be held to have consented to the statute as a part of their contract with the bank, under which the money was deposited. A second and stronger reason why the bank act is probably valid is that matters relating to succession are universally held to be matters affecting a *res*, and therefore the judgment of a competent Court until set aside is effective[5]. It is certainly one thing to require faith to be given to the judgment of a Court of competent jurisdiction fixing status and affecting a *res*, and another to enable a possessor, even a trespasser, to appropriate without redress the rights of the owner, without any judicial proceedings, as does the *Act of 1934*.

The observations of the Court of Appeal, (R. 41, 42), that the statute was enacted for the promotion of just and fair dealings between its citizens and that there is no good reason why the Legislature can not attain this end in situations coming within the purview of the statute in question do not alter the plain fact that the Legislature has not provided a legal remedy and has attempted to remedy the condition by enacting a statute which brings about a far worse result as to another class of persons. A procedure giving the true owner of the land opportunity to protect his interest has not been provided by this statute. What the Legislature did was to enact a statute which has the effect of depriving

---

[5] See Glover vs. Doty, 1 Rob. 130; Taylor vs. Williams, 162 La. 92, 110 So. 100.

the true owner of any remedy whatever for the most high-handed and unlawful invasion of his property rights.

D. The appellant is not estopped from refusing to pay the purchase price of the oil in question.

The appellee's plea of estoppel (upon which the lower Court did not pass, R. 44, 45) is simply that appellant, having bought, must pay the price.

Such principle has no application in Louisiana.

> "The sale of a thing belonging to another person is null; it may give rise to damages, when the buyer knew not that the thing belonged to another person."
>
> *Revised Civil Code of Louisiana, Article 2452.*

In Louisiana, warranty of title is implied in every sale, *Revised Civil Code of Louisiana, Articles 2501, 2505,* and one who has purchased from a seller without title may resist payment of the price, or sue for its return when he already has paid.

> *Bonvillain vs. Bodenheimer, 117 La. 793, 42 So. 273;*
> *Tennent vs. Caffery, 163 La. 976, 991, 113 So. 167, 173;*
> *Abney vs. Levy, 169 La. 159, 124 So. 766.*

Appellee's plea of estoppel furnishes no ground for the affirmance of the judgment of the Court of Appeal.

CONCLUSION

It is submitted that the judgment of the Court of Appeal should be reversed.

Respectfully submitted,

H. C. WALKER, JR.,
ROBERT ROBERTS, JR.,
Counsel for Appellant.

APPENDIX

Act No. 64 of 1934, as amended by Act No. 24 of the First Extra Session of 1935. (Acts of Louisiana, 1934, p. 281; Acts of Louisiana, Extra Sessions of 1934 and 1935, p. 517; Acts of Louisiana, Extraordinary Session of 1935, p. 87; Dart's Louisiana Statutes, Supplement Sections 4822.1 to 4822.5, inclusive.)

The matter enclosed in brackets, in the title and Section 6, was added by the amendment of 1935.

AN ACT

To foster the development of the natural resources of Louisiana by making it unlawful to withhold payment of any sum due lessor, royalty owner, lessee or producer under an oil, gas and mineral lease where the lessee or producer has developed real property under a lease from the last record owner of such property, or of the mineral rights in and to said property have been alienated as of the date of such lease and under whom said lessee or producer claims, holding under an instrument sufficient in terms to transfer title to such property or said mineral rights; to authorize the purchaser of oil, gas or other minerals produced from such property to pay the price therefor to any party in interest under said mineral lease unless and until a suit testing the title to such property or said mineral rights is filed in the district court of the parish wherein said property is situated, with due notification of such filing given to such purchaser in interest, and releasing such purchaser from all responsibility in connection with all payments so made; to declare such producer, as concerns such purchaser against all other parties, conclusively presumed to be the true and lawful owner of all oil, gas or other minerals produced on said property; to provide that said purchaser shall not be entitled to the benefits of this Act unless recorded notice of said

purchase first appears in the conveyance records of the parish where the land producing the purchased products is located; to limit the effects of this Act with respect to such oil, gas or other minerals purchased prior to its effective date; to provide a remedy to compel payment as aforesaid, or under any division order; and to repeal all laws, or parts of laws, in conflict with the provisions of this Act, [and providing that this Act shall not apply to oil, gas and other minerals produced from lands belonging to the State of Louisiana.]

Section 1. Be it enacted by the Legislature of Louisiana, That it shall be unlawful for any person, firm or corporation, or the agent, employee or officer of any such persons, firm or corporation, when

1. such persons, firm or corporation has leased any real property, or has acquired the mineral rights therein by lease or otherwise, from the last record owner thereof, as of the date of such lease and under whom said lessee or producer claims, holding under any instrument sufficient in terms to transfer title to such property or said mineral rights, for the purpose of developing the same for oil, gas or other minerals; or

2. is holding any such lease under any assignment thereof; or

3. is producing for his or its account, or is producing and selling to others, any such oil, gas or other minerals under such lease or under any assignment thereof; or

4. has purchased from any such lessor, or any person holding under such lessor, or from the lessee or any person holding under such lessee, any oil, gas or other minerals produced from said leased property,

to withhold payment from the lessor or lessee, or any person holding from either or both of them, of any rentals, royalties or other sums whatever, including the purchase price of any

such oil, gas or other minerals, due by virtue of such lease to any such lessor or lessee or person holding from either or both of them.

Section 2. That any person, firm or corporation that has actually drilled or opened on any land in this State, under a mineral lease granted by the last record owner, as aforesaid, of such land or of the minerals therein or thereunder if the mineral rights in and to said land have been alienated, who holds under an instrument sufficient in terms to transfer the title to such real property, any well or mine producing oil, gas or other minerals shall be presumed to be holding under lease from the true owner of such land or mineral rights and the lessor, royalty owner, lessee or producer, or persons holding from them, shall be entitled to all oil, gas or other minerals so produced, or to the revenues or proceeds derived therefrom, unless and until a suit testing the title of the land or mineral rights embraced in said lease is filed in the district court of the parish wherein is located said real property. A duly recorded mineral lease from such last record owner shall be full and sufficient authority for any purchaser of oil, gas or other minerals produced by the well or mine aforesaid to make payment of the price of said products to any party in interest under said mineral lease, in the absence of the aforementioned suit to test title or of receipt, by such purchaser, of due notification by registered mail of its filing, and any payment so made shall fully protect the purchaser making the same; and so far as said purchaser is concerned as against all other parties, the producer of such oil, gas or other minerals shall be conclusively presumed to be the true and lawful owner thereof; provided, however, that this protection and presumption, respectively, shall both cease immediately upon the filing, in the district court of the parish wherein said leased land is located, of the aforementioned suit to test title and the receipt by said purchaser of due notification of the filing thereof, which receipt shall be made to appear by the usual postal registry receipt card; and provided, further, that such purchaser shall, however, not be entitled to any of the benefits of this Act unless there shall have been first re-

corded in the conveyance records of the parish wherein such land is located, due notice of the fact that the oil, gas or other minerals produced thereon has been and will be bought by said purchaser.

Section 3. That notwithstanding the foregoing provisions, the purchaser, as respects any oil, gas or other minerals purchased prior to the date upon which this Act goes into effect, shall withhold payment of the purchase price until the lapse of sixty days from said effective date, or shall not be entitled to the protection said Act affords.

Section 4. That a writ of mandamus to compel payment of whatever may be due to any party in interest under the circumstances hereinabove set out, or under any division order, may be issued by any court of competent jurisdiction against any person, firm or corporation liable for the payment claimed; and the proceedings shall be tried by preference.

Section 5. That all laws or parts of laws in conflict with the provisions hereof be and the same are hereby repealed.

[*Section 6.* That this Act shall not apply to oil, gas and other minerals produced from lands belonging to the State of Louisiana.]